DEATH AND TAXES — I

THE INTERRELATIONSHIP OF DEVOLUTION DOCTRINES WITH FEDERAL INCOME AND ESTATE TAX IN DETERMINING RESPONSIBILITIES OF A DECEDENT, HIS ESTATE AND HIS SUCCESSORS

A Study of Interrelated Federal Tax Theories and Their Predicates in Legal History and Doctrine

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"Tax law is not a separate, water-tight compartment. It is only a part of the general fabric of the law."

ARCH M. CANTRALL**

There is need to "eradicate the factual disconnection of subjects. There is only one subject for education and that is life in all its manifestations."

ALFRED NORTH WHITEHEAD***

INTRODUCTION

"Taxation is eminently practical and is in fact brought to every man's door."[1] In everyday practice the federal estate, gift and income taxes are brought to the doorstep by practical impositions upon a widely sweeping variety of legal rights. After the special circumstance of death, there follow other complicating factors. Death itself approximates the taxable event for estate tax purposes, since it triggers many of the devolution devices.[2] It complicates even more the

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1 Mr. Justice Peckham, deciding Nicol v. Ames, 173 U.S. 509, 519, 3 Am. Fed. Tax R. 2661 (1899); the same notion was repeated by Mr. Justice McReynolds in Farmers Loan & Trust Co. v. Minn., 280 U.S. 204, 8 Am. Fed. Tax R. 10257 (1930), by Mr. Justice Sutherland in Tyler v. United States, 281 U.S. 497, 503, 8 Am. Fed. Tax R. 10912, 10915 (1930), and by Mr. Justice Black in United States v. Jacobs, 306 U.S. 363, 22 Am. Fed. Tax R. 282, 39-1 U.S.T.C. ¶ 9336 (1939).

2 The Supreme Court early held that the federal estate tax falls not on the property itself but is an excise tax which falls on the privilege of transmission to others. Knowlton v. Moore, 174 U.S. 41, 3 Am. Fed. Tax R. 2684 (1900); New York Trust Co. v. Eisner, 256 U.S. 345, 3 Am. Fed. Tax R. 3110 (1921).

income tax pattern because of the additional intermixture of more time, additional taxable persons, varying rates and divergent devices of devolution.

In the nature of things, the rights to untaxed income owned at death must be specially treated to adjust for the fact of death, either to avoid a loophole by which successors altogether escape the income tax,[3] or conversely to avoid a method as a result of which they might be required to pay more merely because of it.[4] But the fact of succession is also involved; at the instant of death, if all the income rights of a decedent had been successfully realized, if all his deductibles had been paid in fact and had been returned for taxation up to his death, and if the resulting income tax liabilities had been satisfied, the decedent's estate would still be liable for a succession tax upon the net value of the assets remaining in hand. To assume this unrealistically comprehensive settlement highlights the obvious; the fact and timing of death are hardly more considerate and convenient to the tax collector than to others. Lacking an overall composition up to death, some successor must assemble the information, marshall the assets, satisfy the creditors and pay the taxes.

A Survey of the Background of State Property Devolution Doctrines Which Affect Federal Income and Estate Tax Responsibilities Following Death

Overgeneralizing,[5] it can be said that the determination of federal income tax liabilities tends to hinge primarily on federal concepts,[6] but not always.[7] By contrast, federal estate tax liability falls

[3] For example see Nichols v. United States, 64 Ct. Cl. 241, 6 Am. Fed. Tax R. 6592 (1927) in which ante-mortem uncollected income rights which were includible in an estate as corpus were not taxable as income when collected prior to 1934.

[4] The bunching problem and the present statutory solution were discussed in Comm'r v. Linde, 213 F.2d 15, 45 Am. Fed. Tax R. 1522, 1526, 54-1 U.S.T.C. ¶ 9384 (9th Cir.), *cert. denied*, 348 U.S. 871 (1954).

[5] The scope and accuracy of, and the sweep of extensive exceptions to these grand summaries require separate inquiries of major proportions. 10 Mertens, Law of Federal Income Taxation § 61 (1958); 1 Mertens, Law of Federal Gift & Estate Taxation § 10 (1959); Rabkin & Johnson, Federal Income Estate & Gift Taxation § 71.08 (1951).

[6] Among many other, consider Lyeth v. Hoey, 305 U.S. 188, 21 Am. Fed. Tax R. 986, 38-2 U.S.T.C. ¶ 9602 (1938) holding that state law defining incomes and inheritances is not controlling in determining federal statutory exemption of inheritance from the income tax.

[7] Occasionally federal law will import state legal doctrine to determine federal income tax consequences. Thus, for example, it has been held that state law defines payment under the meaning of the statute which requires payment within two and one-half months by certain corporations to related persons under the Internal Revenue Code of 1954, § 267. Lincoln Storage Warehouse Co. v. Comm'r, 189 F.2d 337, 40 Am. Fed. Tax R. 691, 50-2 U.S.T.C. ¶ 9394 (3d Cir. 1951) (under New Jersey law); *accord*

principally on rights which mostly are based on state law[8] without regard to who succeeds to the property values. Devolution devices determine the choice of the ultimate taxable person on whom falls the income tax traceable to the decedent or his property.

Devolution technique potentially has two major functions: (1) it may be concerned with the payment of the debts of the decedent as a precedent condition followed by (2) distribution of the remaining property of the decedent to his successors. These two fundamentals do not necessarily coexist.[9] There has grown up in the jurisprudence of most American states a trichotomy of methods and attitudes which are summarized and overly simplified at table 1, *infra*.

These three governing doctrines are the remnant of three divergent legal histories each of which have had direct relevance in fashioning modern property devolution methods:

1. Modern Probate Administration: Modern probate administration arose out of the deep penetration of the medieval church into the temporal affairs of the English people. Before the Reformation, the church was an arm of government. As far back as Norman times, ecclesiastical courts considered themselves charged with the duty to act *pro salute anima,* for the good of the soul of the decedent.[10] To protect the decedent's post-mortem conscience it was necessary that his unpaid debts be satisfied. This finished, the church supervised the distribution of personal property to sucessors.[11] In a later era after the Ref-

Barneby Cheney Engineering Co., 13 CCH Tax Ct. Mem. 683, 23 P-H Tax Ct. Mem. 655 (1954) (under Ohio law).

[8] Compare Morgan v. Comm'r, 309 U.S. 78, 80, 23 Am. Fed. Tax R. 1046, 40-1 U.S.T.C. ¶ 9210 (1940); Johnson v. Helvering, 141 F.2d 208, 210, 32 Am. Fed. Tax R. 280, 44-1 U.S.T.C. ¶ 9215 (2d Cir.), *cert. denied,* 323 U.S. 715 (1944); and notice Richardson v. United States, 177 F. Supp. 394, 4 Am. Fed. Tax R.2d 5642, 59-2 U.S.T.C. ¶ 9712 (E.D. Mich. 1959) (app. to 6th Cir. 1960) particularly urging as a ground of error the applied contrast between state and federal law.

[9] Recognizing the twin probate duty to first pay debts, then to distribute to successors, modern decisions have permitted extra-judicial distribution in the form of contractual family settlements where creditors were not directly damaged. 21 Am. Jur. "Executors and Administrators" § 21 (1958); Annot., 54 A.L.R. 976 (1928); see *In re* Estate of Christian, 33 Ohio L. Abs. 367 (Ct. App. 1940).

[10] See Holdsworth, *infra* note 11.

[11] "The ecclesiastical courts obtained jurisdiction over grants of Probate (sic) and Administration (sic) and to a certain degree, over the conduct of the executor and administrator. All these branches of their jurisdiction could be exercised only over personal estate: and this abandonment of jurisdiction to the ecclesiastical courts has tended, more than any other single cause to accentuate the difference between real and personal property. Even when the ecclesiastical courts had ceased to exercise some parts of this jurisdiction, the law which they had created was exercised by their successors. . . ." Holdsworth, "The Ecclesiastical Courts and Their Jurisdiction," in The History of English Law 301, 302-11 (1903).

TABLE 1
A SUMMARY OF COMPARATIVE AMERICAN METHODS OF DEVOLUTION

General nomenclature description	Standards for determination of path of succession	Historical method: primary objectives	Recognition of claims of creditors: are they prior to succession?	Legal mechanics of the passage of title to successors	Ultimate beneficiary of income and deductions [this determines the duty to pay federal income taxes on income derived from the ancestor][a]
Probate property other than real real estate	SUCCESSORS ARE DETERMINED FROM TESTAMENT OR AS DESIGNATED BY LAW	English ecclesiastical courts applied medieval Christian dogma as rule of law[b]	The fiduciary paid the debts first to protect the soul of the deceased	Title passes first to the representative for administration before transfer to beneficiaries	The executor or administrator is legally responsible to see to the payment of all debts; he pays income taxes accrued during administration.
Real property		English common law courts interpreted the needs of the feudal system	Creditors were largely disregarded so as to protect integrity of land ownership	Title passes directly to the heirs outside of the estate subject to probate recapture[c]	The individual heir receives the property directly at death. As a result he receives post mortem rents and deductions attributable to the real estate
Non-probate succession arrangements by decedent during his lifetime	SUCCESSION IS FIXED ACCORDING TO CONTRACT	Modern courts enforce arrangements as third party beneficiary contracts	Creditors are ignored because contracts do not specifically require payment	Contractual duties assumed by a third party are enforced at request of beneficiary	Successors to non-probate property usually have no legal liability for debts of decedent. They are liable as successors for taxes on traceable income

[a] The wide sweep of income and deductions in respect of a decedent in effect carry the duty to pay the income taxes and the right to claim deductions to any successor. Int. Rev. Code of 1954, § 691; see also table 3 *infra*.

[b] The sole jurisdiction in the early church courts gave way to authority concurrent with the chancery courts and finally in 1857 was abolished in England in favor of the exclusive jurisdiction of the Court of Probate. See note 12 *infra*; 21 Am. Jur. "Executors & Administrators" § 23 (1958).

[c] Ohio has conferred authority on a fiduciary to ask a court to assume jurisdiction to sell land of a decedent where it is necessary to pay debts. Ohio Rev. Code § 2127.02 (1953). This rule is in accord with the general modern American law of succession to real estate. 21 Am. Jur. "Executors & Administrators" § 391 (1958). Even so, the remnants of the ancient English protection for the landowner still means that, in the absence of a testamentary direction to the contrary, personalty must be first exhausted before recourse can be had against the real estate. 22 Ohio Jur. 2d "Executors & Administrators" § 338 (1956). This is so even where the debt is secured by a mortgage on real estate; and a specific devise to an heir must be exonerated from the lien payment out of personalty. Foreman v. Medina County Nat'l Bank, 119 Ohio St. 17, 162 N.E. 42 (1928); 21 Am. Jur. "Executors & Administrators" § 297 (1958); and Ohio Rev. Code § 2107.53 (1953).

ormation, the jurisdiction was partially shared with the chancery courts[12] and was finally transferred exclusively to the English Court of Probate after 1857.[13] American law follows these inherited practices.

2. *The Special Character and Quality of Modern Real Estate Law:* This development resulted from the feudal system which brought with it the money and troop-raising obligations imposed on large English landowners after the Norman conquest in 1066. William's successors evolved the holder's responsibility as a handy way to raise money and to provide armies for warfare.[14] Perhaps it is this background which lives on in our current practice to refer to both taxes and soldiers as "levies." To keep responsibility concentrated, the right to convey land was limited in the early periods of English law.[15] The tenacious rule of primogeniture was one familiar by-product.[16] Severe limitations on the right to seize land for the payment of the debts of a decedent were another congruent result.[17] The enforcement of the law of real estate was within the exclusive control of the law courts; to serve these policies, the judges evolved their own independent doctrine.[18] Thus the concentration of the right of descent to the exclusion of the claims of creditors was one fundamental application; the rights of creditors were necessarily held to be subordinate or non-existent.[19] A corrollary standard is still very much intact in modern law: real estate descends directly to the

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[12] Kiralfy, Potter's Historical Introduction to English Law & Its Institutions 593 (1958).

[13] The probate function in England was exercised by both the ecclesiastical and the chancery courts from about the time of the Restoration in 1660 until 1857. The ecclesiastical jurisdiction had been abolished in 1640 by the Cromwellian legislature only to be reconstituted in 1641. Kiralfy, *op. cit. supra* note 12 at 220, 221. See also 21 Am. Jur. "Executors & Administrators" § 23 (1958).

[14] Kiralfy, *op. cit. supra* note 12 at 31, 481, 488, 557, 593; Kinnane, Anglo American Law 249-51 (2d ed. 1932).

[15] Kiralfy, *op. cit. supra* note 12, at 562; Walsh, A History of Anglo American Law 52 (2d ed. 1932).

[16] Primogeniture seems to have been dominant if not absolute during much of English legal history until its effective statutory abolition in 1926 by Law of Property Act of 1925, § 201(2). Kiralfy, *op. cit. supra* note 12 at 557, 560 and 562 *passim*; Walsh, *op. cit. supra* note 15, at 284; Plucknett, A Concise History of the Common Law 497-500 (4th ed. 1948).

[17] "[F]eudal principles were opposed to making land liable to seizure for the debts of its owner. . . ." Not until 1807 in England could land be held for ordinary debt obligations of a deceased owner. Jenks, Short History of English Law 36, 37, 250 (2d rev. ed. 1922); 22 Ohio Jur. 2d "Executors & Administrators" § 144 (1956).

[18] Kiralfy, *op. cit. supra* note 12, at 219, 220, 553, 562, 593 *passim*; Kinnane, *op. cit. supra* note 14, at 275.

[19] See Jenks, *op. cit. supra* note 17.

heirs[20] with the result that the general authority of the probate administrator over real estate is limited to only a few circumstances.[21] For these historically significant reasons, real property and personalty were treated differently by two differing and coexistent systems of English law which divergently viewed whether there was a duty to pay creditors[22] or whether the rights of successors were overriding.[23]

3. Contractual succession arrangements: These arrangements characterize a broad variety of rights which seem to be comparatively more modern in origin. Succession outside of the probate pattern and beyond the control of the probate courts is provided for as a result of an actively expressed present intent of the owner[24] found in an inter vivos agreement for the post-mortem benefit of successors. These agreements behave like and resemble familiar third party benefits based upon old applications of the law of contracts.[25] Among a host of examples of non-probate successions based upon lifetime arrangements, the following familiar instances might be suggested:

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[20] An executor or an administrator does not take title to a decedents realty, but the title is vested in the heirs or devisees, nor do they derive title through him. 21 Am. Jur. "Executors & Administrators" § 285 (1958); 33 C.J.S. "Executors & Administrators" § 252 (1942); 22 Ohio Jur. 2d "Executors & Administrators" §§ 144, 394 (1956); *see also* Kiralfy, *op. cit. supra* note 12, at 556.

[21] Of course, the decedent may effectively grant authority by will to the executor to treat the realty as a part of the estate, 33 C.J.S. "Executors & Administrators" § 252 (1942), or the authority may be conferred by statute so as to be approximately the same as the grant as to personalty. Ohio Rev. Code § 2113.311 (1958) allows the estate to control real estate for management in limited circumstances.

[22] Contrast the common law protection of landowners against creditors, *supra* note 17, with the ecclesiastical doctrine requiring the payment of debts out of personalty in what is now a probate situation; see text at *supra* note 10.

[23] During the Middle Ages, intestacy was rare because this condition was viewed as a moral deficiency since the decedent was thought to have probably rejected the last ministrations of the church. Kiralfy, *op. cit. supra* note 12, at 562; Plucknett, *op. cit. supra* note 16, at 689. An administrator was considered the delegate of the bishop, but the executor was not. Kiralfy, *op. cit. supra* note 12, at 554, 561.

[24] The intent test has been verbalized as precedent ever since early in the emergence of the doctrine in Ohio. Comm'r v. Hutchison, 120 Ohio St. 361, 166 N.E. 352 (1929); Cleveland Trust Co. v. Scobie, 114 Ohio St. 241, 151 N.E. 373 (1926).

[25] Ohio has adopted the so-called contract theory as distinguished from the gift or trust theory. Rhorbacker v. Citizens Bldg. & Loan Ass'n, 138 Ohio St. 273, 34 N.E.2d 751 (1941), noted in 8 Ohio St. L.J. 124 (1941). The contract idea when combined with a debtor-creditor relationship in which title passes to an obligor eliminates the need for delivery required by gift theory. *In re* Estate of Copeland, 74 Ohio App. 164, 58 N.E.2d 64 (1943). The third party beneficiary theory was explicitly recognized in Lambert v. Lambert, 95 Ohio App. 187, 118 N.E.2d 545 (1953). See 12 Am. Jur. "Contracts" § 274 (1958) which discusses the majority rule permitting a third party beneficiary to enforce the contract even though he is a stranger both to the contract and to the consideration. Ohio is in accord. Visintine & Co. v. New York, C. & S. L. R.R., 169 Ohio St. 505, 160 N.E.2d 311 (1959); 11 Ohio Jur. 2d "Contracts" § 176 (1955). See also *infra* note 40.

(a) A life insurer agrees to make payment according to stated terms to designated beneficiaries[26] after the death of the insured.[27]

(b) A bank[28] or building and loan association[29] contracts to pay out a deposit account to a survivor beneficiary plainly designated by the depositor as a successor[30] even though to do so plainly offends public conscience.[31]

(c) The federal government promises to apply its own published standards[32] to determine outside of probate rules the party entitled to collect the post-mortem proceeds of government bonds.[33]

(d) An employer as a part of his duties to his employee by contract undertakes to disburse death benefits to the employees designated beneficiary.[34]

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26 By Ohio statute the designated beneficiary in a life insurance contract cannot recover if murder was involved. See *infra* note 31.

27 Keckley v. Coshocton Glass Co., 86 Ohio St. 213, 99 N.E. 299 (1912); 30 Ohio Jur. 2d "Insurance" § 5 (1958).

28 Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636 (1940); 7 Ohio Jur. 2d "Banks" § 121 (1954). For a good summary of the cases, see *In re* Schroeder, 75 Ohio L. Abs. 555, 144 N.E.2d 512 (P. Ct. 1957).

29 8 Ohio Jur. 2d "Building & Loan Associations" § 31 (1954); the result is strongly influenced by Ohio Rev. Code § 1151.19 (1953).

30 The effectiveness of survivorship designations turns on the presence of convincing evidence of intent. 7 Ohio Jur. 2d "Banks" § 122 (1954); Keyt v. Mitchell, 106 Ohio App. 149, 153 N.E.2d 690 (1957); Bauman v. Waltet, 160 Ohio St. 273, 116 N.E.2d 435 (1953).

31 A series of cases reinforce one infamous precedent in Ohio which permitted a murderer to take property held in a joint bank account where he was the survivor beneficiary. Had the asset been probate property, this result would have been forbidden by Ohio Rev. Code § 2105.19 (1953). Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935). Far from being concerned with the conscience of the survivor, the Ohio Supreme Court held for the murderer based upon the vested interest notion. It was admittedly unhappy with its own result, but contended itself with the comment that it sat as "a court of law and not a theological institution." The case has been soundly criticized; Vanneman, "The Constructive Trust: A Neglected Remedy in Ohio," 3 Ohio St. L.J. 1 (1936); 10 U. Cinc. L. Rev. 366 (1938). See also note, 27 U. Cinc. L. Rev. 135 (1958); Note, 16 Ohio St. L.J. 117 (1955); and Note, 15 Ohio St. L.J. 235 (1954). Happily this result does not follow as to insurance proceeds. Neff v. Massachusetts Mutual Life Ins. Co., 158 Ohio St. 45, 107 N.E.2d 100 (1952).

32 Federal regulations provide that where two or more names are listed as co-owners, the value passes to the survivors at the death of one. By regulation, no explicit language of survivorship is necessary. 31 C.F.R. § 315.61 (1959), based on 31 U.S.C. § 757c (1958).

33 The Treasury regulations become a part of the contract. *In re* Estate of DiSanto, 142 Ohio St. 223, 51 N.E.2d 639 (1943).

34 Death benefit contracts payable by employers by reason of the death of the employee have become sufficiently common as to have their own explicit method of taxation. As to estate taxes, see an excellent article by Kramer, "Employee Benefits and Federal Estate and Gift Taxes," 3 Tax Counselors Quarterly 49 (1959). See also Bilder, "Death Benefits Paid Under An Express Contract," 34 Taxes 529 (1956). As to income taxes where there is a binding agreement, consider § 101(6)(2) of the Internal Revenue Code of 1954, along with Simpson v. United States, 261 F.2d 497, 2 Am. Fed. Tax R.2d

(e) An Ohio corporation, under the authority of a statute, recognizes properly designated survivorship succession to property rights in its own shares.[35]

(f) A trustee assumes an enforceable contractual duty to his cestui based on the obligations spelled out in a trust instrument.[36]

(g) Title to real estate passes to a survivor under the terms of a conveyance. This device looks like the ancient English joint estate in real property[37] which, as a rule of law, did not survive the ocean voyage and the transit of the Appalachian wilderness to Ohio.[38] The same effect has been reached as a result of the intent of the parties.[39] (Contrast this with the examples which are based on a contract by a third person liable to perform a post-mortem duty. Where in this real estate survivorship arrangement is the third person obligor characteristic to this type of relationship?)[40]

2036, 58-2 U.S.T.C. ¶ 9923 (7th Cir. 1958), *cert. denied*, 359 U.S. 944 (1959). For income tax implications of voluntary payments in the absence of an enforceable obligation, see Death & Taxes II at 355, and Richards, "Voluntary Payments to Widows or Beneficiaries of Deceased Employees," 22 Ohio St. L.J. 318 (1961).

35 The Ohio Corporation Code explicitly confers on a corporation the right to permit a shareholder to create as to its shares ". . . a joint estate with the incidents of a joint estate as at common law including the right of survivorship . . ." without the necessity of explicit language of survivorship. Ohio Rev. Code § 1701.24 (1953).

36 54 Am. Jur. "Trusts" §§ 15, 63 (1958); Hill v. Irons, 160 Ohio St. 21, 113 N.E.2d 243 (1953).

37 "The 'grand incident of joint estate is the doctrine of survivorship "by which, when two or more persons are seized of a joint estate, . . . the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be"' " citing Freeman, Cotenancy & Partition, § 12 (2d ed. 1886). See opinion by Mr. Justice Black in United States v. Jacobs, 306 U.S. 363, 22 Am. Fed. Tax R. 282 (1939).

38 Farmers & Merchants National Bank v. Wallace, 45 Ohio St. 152, 12 N.E. 439 (1887), based upon Sergeant v. Steinberger, 2 Ohio 305 (1827).

39 Cleaver v. Long, 69 Ohio L. Abs. 488, 126 N.E.2d 479 (C.P. 1955); Barsch, "Survivorship Deeds," 22 Ohio Bar (No. 13) (1949); Kinney, "Conveyancing in Ohio" (1955), pamphlet privately published in Cleveland, Ohio; Martin, "The Incident of Survivorship in Ohio," 3 Ohio St. L.J. 48 (1936); Owen, "Survivorship Deeds in Ohio," 3 W. Res. L. Rev. 60 (1951); White, "Notes on Survivorship Deeds-So-Called," 24 Ohio Op. 119 (1942); Zangerle, "Joint & Survivorship Property—Husband and Wife," 24 Ohio Bar (No. 28) 441 (1951); Ohio State Bar Association, "Standards of Title Examination," ¶ 3.4, (1955). Generally, as to tax implications, see Alexander, "Joint and Survivorship Property," 20 Ohio St. L.J. 75 (1959).

40 The dissenting opinion of Judge Turner in Rhorbacker v. Citizens Bldg. Ass'n, 138 Ohio St. 273, 34 N.E.2d 751 (1941), pointed out that the early Ohio contract theory cases depended upon the presence of some type of contractual undertaking between the decedent and the survivor. For the first time in Ohio, the *Rhorbacker* case explicitly turned upon the bank's contract with the depositor with no direct relationship with the survivor as such. For the majority, Judge Zimmerman expressly admitted this new development and analogized the Ohio joint and survivorship doctrine to the third party beneficiary rule. *Id.* at 276, 34 N.E.2d at 253. A court of appeals expressly refused to apply the third party theory where money in kind was kept intact until death in the decedents constructive possession in his safe deposit box. The court held that the

These are convincing enumerations of the broad power of an owner by lifetime arrangements with third persons to provide for varying results in succession. The contrast is overwhelming: the familiar ancient probate obligation of conscience[41] imposed upon the decedent's estate to pay debts is protected in only a few limited situations. No longer do courts feel called upon to murmur *requiescat in pace* over the soul of the decedent. To apply the ancient hypothesis, his spirit can be saved under modern law in the presence of unsatisfied debts only if his property can somehow be made subject to probate jurisdiction.

There are some situations where inter vivos arrangements have not been effective to shut off the rights of creditors in favor of named non-probate successors. These results apparently follow from the

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beneficiary contract theory could be applied only where there was a debtor-creditor relationship by which title had passed to the bank and where the depositor had obligated the bank to disburse after death for the benefit of the third party. *In re* Estate of Copeland, 74 Ohio App. 164, 58 N.E.2d 64 (1943). That the property was still in the possession of the decedent indicated a failure to accomplish delivery of the property with sufficient definiteness to satisfy the legal element needed to effect a gift. There was no debt element from another party on the basis of which the beneficiary was entitled to the benefit of protection under the contract theory. See also *supra* note 25.

[41] The modern American Catholic conscience is explicitly held to a moral obligation "as a group to give a high example of integrity in this matter of sharing the tax burden . . . .

In our modern society, it has become quite general for wage-earners to pay income taxes and we would do well at this time of year to examine the moral aspects of this problem.

There have been a few Catholic moralists who held the view that the evasion of income taxes concerned only a penal law and hence was not a matter of conscience. But these opinions were based on the prevailing practices of a different society. In certain countries the whole economy is based on 'haggling.' Goods are bought and goods are sold, not on a firm, fixed price, but rather on 'the haggling wit' of buyer and seller.

Taxes in such countries are collected in pretty much the same way and the final amount is the result of anticipated 'haggling.' Under such a system only a fool declares his total income and the government is satisfied to settle at 'a reasonable figure.'

In our day and age, taxes are imposed and collected on rather strict accounting principles. True, there are inequities in our tax structure . . . . We are never permitted to lie and cheat . . . .

[We must concede that] this 'average honesty' or 'rule of thumb honesty' [exists]. We are not implying that this sort of thing is an adequate norm of honesty in our personal lives, but it seems to be an accepted norm in this area of tax payments, deductions, etc. . . .

In the meantime as we near that inevitable time of the year, about all we can do is pay and pay patriotically."

I have extracted extensive quotations *passim* from the Sunday bulletin for March 19, 1961 issued by Saint Andrews Catholic Church of Columbus "published with ecclesiastical approbation" by J. G. O'Brien Co., Peoria, Illinois. Appreciation is extended to Mrs. Angelina Tose of our staff for discovering this material.

decedent's failure to sufficiently purge himself of all incidents of his property rights. Where the strings retained argue against the completeness of the owner's gift,[42] in some situations, the widow may enforce her marital rights after death,[43] but creditors do not share this post-mortem authority.[44] Perhaps like the spendthrift provisions in the trust field,[45] the obligor's specific duties to disburse only to named successors seem to be limited to explicit definitions recited in the contractual undertaking;[46] and there seems to be little obligation on a non-probate obligor to consider the claims of general creditors[47] excepting possibly the decedents liability for federal taxes.[48]

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[42] Common law principles have long recognized some flexibility in the right of an owner to alienate his property even though to do so would tend to deprive his creditors of means out of which to satisfy their claims. 25 Ohio Jur. 2d "Fraudulent Conveyances" § 26 *passim* (1957). This right has been cut down by the statute of frauds forbidding conveyances in fraud of creditors. Ohio Rev. Code § 1335.02 (1953). Since a general conveyance to outsiders could be cancelled in a proceeding in equity, it is hardly surprising to find that a statute holds that a revocable trust conveyance can be cancelled in equity for the same reason. Ohio Rev. Code § 1335.01 (1953).

[43] Harris v. Harris, 147 Ohio St. 437, 72 N.E.2d 378 (1947); see cases from other states collected by Casner, Estate Planning 82 (2d ed. 1956).

[44] A creditor cannot invoke the power of revocation in an inter vivos trust after death notwithstanding the provisions of Ohio Rev. Code § 1335.01 (1953). Since the grantor died without revoking, his creditors cannot invoke the statute which applies only during the lifetime of the grantor. Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E.2d 119 (1939); Goldman, Rights of the Spouse and the Creditor in Inter Vivos Trusts, 17 U. Cinc. L. Rev. 1 (1948).

[45] 54 Am. Jur. "Trusts" § 152 (1958).

[46] Consider the argument by an insurer that the government could not attach life insurance proceeds for the satisfaction of unpaid income tax liabilities because it could not be relieved of its contractual obligation to the insured under automatic premium loan provisions in the policies. The point was rejected in United States v. Metropolitan Life Ins. Co., 256 F.2d 17, 1 Am. Fed. Tax R.2d 746 (4th Cir. 1958).

[47] For some time the federal estate tax partially ignored claims against non-probate property; this variety of administration expenses formerly could not be deducted in determining the taxable estate because the statute permitted deduction only for probate administration costs. See Comm'r v. Davis, 132 F.2d 644, 30 Am. Fed. Tax R. 647, 43-1 U.S.T.C. ¶ 9239 (1st Cir. 1943); compare with Sharpe's Estate v. Comm'r, 148 F.2d 179, 33 Am. Fed. Tax R. 906, 45-1 U.S.T.C. ¶ 10,185 (3d Cir. 1945); see also Haggart v. Comm'r, 182 F.2d 514, 39 Am. Fed. Tax R. 537, 50-1 U.S.T.C. ¶ 10,772 (3d Cir. 1950). To grant the deduction, since 1954 the non-probate expenditures are now recognized under § 2053(b) of the Internal Revenue Code if they were paid within a stated limitation period. The federal statute has been specially recast to deal with the distinction so as to allow the deductions which originate outside the probate estate.

The same distinction inheres in the Ohio inheritance tax statute. Deductions still unused after exhausting the probate estate cannot be carried across so as to reduce the non-probate succession. In effect, the deductions unused against the probate property do not apply at all for inheritance tax relief. *In re* Estate of Chadwick, 167 Ohio St. 272 (1958).

[48] Under federal law, any fiduciary or other person who distributes assets without

Frequently a given asset will not satisfactorily stay put within these neat categories of definition. Real estate can be treated as non-probate property by a lifetime contract[49] or as a probate asset where the decedent so provides by his will[50] or where state law requires it,[51] or perhaps where state law permits it to be pulled into the estate for convenience in administration.[52] Furthermore, the lifetime arrangement may not work; it might fail for want of proof of intent[53] or because of the failure of the named beneficiary. In these situations, the property will revert back to the probate estate for administration and distribution.[54]

Given the influence of state law in ascertaining the taxable person for federal income tax purposes, it is inescapable that these intercomplicated property doctrines materially influence the federal tax law and its techniques. The flexibility of the property doctrines have generated equally effective federal estate and income tax doctrines to reach at death the variegated interests which have in common at least the factor of economic value. The precise legal nomenclature, classification and terminology are largely irrelevant; the estate and income tax bite equally into all three major devolution categories. See table 2 *infra*.

Without regard to the refinements of legal doctrine[55] for federal

satisfying the federal tax claims against the person or estate becomes personally liable for having done so. 48 Stat. 760, 31 U.S.C. §§ 191, 192 (1958). Generally see, Greenbaum, "Tax Responsibilities of the Executor, the Administrator & the Trustee," 2 Estate Tax Techniques 2003 (1960); Alexander, "Personal Liability of Executors and Trustees for Federal Income, Estate and Gift Taxes," 9 Tax L. Rev. 1 (1953); Dewey, "Hidden Liabilities of Fiduciaries," 99 Trust & Estates 312 (April, 1960). This aspect has tremendous scope in a swiftly developing field of law. Even part of this may depend upon state law. Consider United States v. Bess, 357 U.S. 51, Am. Fed. Tax R.2d 1904, 58-2 U.S.T.C. ¶ 9595 (1958) and Comm'r v. Stern, 357 U.S. 39, 1 Am. Fed. Tax R.2d 1899, 58-2 U.S.T.C. ¶ 9594 (1958). The Ohio Probate Code has a comprehensive arrangement to insure the payment of the debts of a decedent. Ohio Rev. Code § 2117.06 (1953).

[49] See *supra* note 39.

[50] Ohio Rev. Code § 2113.39 (1953) authorizes direct sale by the executor without judicial intervention when authority has been conferred by the will.

[51] Ohio Rev. Code §§ 2127.01 and 2127.02 (1953) authorizes judicial sale when necessary to pay debts.

[52] Ohio Rev. Code § 2113.311 (1958) allows a probte court to grant authority in limited cases to an executor or administrator to take charge of and manage real estate of the decedent to the exclusion of the heirs.

[53] See the intent problem discussed at *supra* note 30.

[54] Ryan v. Rothweiler, 50 Ohio St. 595, 35 N.E. 679 (1893) held that life insurance proceeds which provided for non-probate succession must be paid to the estate administrator on failure of beneficiaries named in the policy.

[55] The broad rule of inclusion spelled out in the Internal Revenue Code of 1954, § 2033 taxes the value of all property to the extent of the interest of the decedent at the time of his death, excepting only foreign real estate.

estate tax purposes, retained interests[56] in the decedent are not severed from continuing control sufficiently to escape taxability if there be remnant authority in the decedent by power of revocation,[57] or by reserved control over income,[58] or by continuing authority to designate the path of devolution[59] or by diversionary administrative control.[60] Too long in delaying to effectively terminate these controls will produce the same result.[61] Automatic devolution by conventional joint property ownership arrangements is easily includible.[62] Similarly, lifetime contractual arrangements in the form of annuities with survivorship features,[63] insurance on the life of the owner[64] or on the life of another controlled by the decedent,[65] and benefits payable by reason of death,[66] are all includible. For the most part, these lifetime contracts usually carry their own built-in devolution provisions explicitly designed to operate outside of probate succession patterns. All of these refinements come to the same end: they are all includible for federal estate tax purposes quite apart from the narrow scope of definition under probate law,[67] without regard to who may be the ultimate beneficiary. The few loopholes in estate tax includ-

[56] The key to estate taxability of many fractured interests is the essential element that the principal property must have been the general property of the decedent in such form that it would have been includible in his estate. Having once held the powers of ownership, when it is comminuted by the almost illimitable refinements of conveyancing, a retained control over income benefit, devolution or administrative diversion (see *infra* notes 58 and 60) are the remnant of earlier ownership. They are really strings. See the discussion by Judge Weinman in Rundle v. Welch, 184 F. Supp. 777, 5 Am. Fed. Tax R.2d 1916 (S.D. Ohio 1960) and cases cited; Comm'r v. Chase Nat'l Bank of New York, 82 F.2d 157, 17 Am. Fed. Tax R. 576, 36-1 U.S.T.C. ¶ 9154 (2d Cir.), *cert. denied*, 299 U.S. 552 (1936); and discussion by Lowndes & Kramer, Federal Estate & Gift Taxes 247 (1956); Foosaner, "Transfers Intended to Take Effect at Death," 1 Estate Tax Techniques 1201 (1955), especially at 1222 with history and authorities.

[57] Int. Rev. Code of 1954, § 2038.

[58] Int. Rev. Code of 1954, § 2036(a); Covey, "Section 2036—The New Problem Child of the Federal Estate Tax," 4 Tax Counselors Quarterly 121 (1960); Gray and Covey, "State Street—A Case Study of Sections 2036(a)(2) and 2038," 15 Tax L. Rev. 75 (1959).

[59] Int. Rev. Code of 1954, §§ 2037, 2038 and 2041.

[60] State Street Trust Co. v. United States, 263 F.2d 635, 3 Am. Fed. Tax R.2d 1764, 59-1 U.S.T.C. ¶ 11,849 (1st Cir. 1959); see also Covey, *supra* note 58, at 140.

[61] Int. Rev. Code of 1954, § 2035.

[62] Int. Rev. Code of 1954, § 2040.

[63] Int. Rev. Code of 1954, § 2039.

[64] Int. Rev. Code of 1954, § 2042.

[65] Estate of R.C. duPont v. Comm'r, 233 F.2d 210, 49 Am. Fed. Tax R.2d 1203, 56-1 U.S.T.C. ¶ 11607 (3d Cir.), *cert. denied*, 352 U.S. 878 (1956); Int. Rev. Code of 1954, § 2033(a).

[66] Lowndes & Kramer, *op. cit. supra* note 56, at 295.

[67] Present law broadly fixes the successors' basis at the fair market value at which the property devolved. The result is the same whether it was subject to probate ad-

ibility are not large,[68] and the broad sweep of inclusions seems to be reinforced by the enforcement standards of the courts.[69]

A broad statute and generally effective judicial attitudes have produced broad definitions of inclusion for income tax purposes.[70] The trichotomy of devolution devices shunts taxable income—broadly defined—to a wide span of ultimate beneficiaries determined by these complex patterns. From all of this it is obvious that as an intensely practical matter, both estate and income taxation are brought to the doorstep of many no matter what the refinements of legal title.[71] The broad holes in the estate tax[72] and income tax[73] patterns seem to be caused by factors other than the variegated and complicated property and devolution system on which they have been superimposed. We turn then to examine how the devolution doctrines operate as to the collection of the decedent's taxes and tax debts under each method and to see the effect on each class of beneficiaries after the taxes have been paid. Do the differences affect collection of the taxes? After they have paid, whose inheritance is reduced?

Collection of the Decedent's Federal Taxes and Allocation Among His Successors of Their Economic Burden

The right of ultimate collection of federal estate taxes out of a decedent's property is not impeded by the trichotomy of devolution

ministration or whether it passed outside the probate succession. Int. Rev. Code of 1954, § 1014(b)(9). This rule does not apply where includible property was sold by the successor during the lifetime of the decedent. Treas. Reg. § 1.1014-1(a) (1957). The rule before 1954 applied only to probate property; although includible for estate tax purposes, the decedents fair market value did not necessarily apply to successions outside the probate pattern. Spicer v. United States, 103 F. Supp. 472, 52 Am. Fed. Tax R. 211 (Ct. Cl. 1950). Thus one disparity between the two taxes was eliminated but other major areas remain.

68 The need for general reform of the estate tax system has been developed. Eisenstein, "The Rise and Decline of the Estate Tax," 11 Tax L. Rev. 223 (1956); Dewind, "The Approaching Crises in Federal Estate & Gift Taxation," 38 Calif. L. Rev. 79 (1950); Surrey, "An Introduction to Revision of Federal Estate and Gift Taxes," 38 Calif. L. Rev. 1 (1950).

69 The *State Street* case, *supra* note 60 is an example of a strict attitude on includibility.

70 Consider the line of cases of which Helvering v. Horst, 311 U.S. 112, 24 Am. Fed. Tax R. 1058, 40-2 U.S.T.C. ¶ 9787 (1940); Helvering v. Clifford, 309 U.S. 331, 23 Am. Fed. Tax R. 1077, 40-1 U.S.T.C. ¶ 9265 (1940) and Lucas v. Earl, 281 U.S. 111, 8 Am. Fed. Tax R. 10287 (1930) are examples; Rice, "Judicial Trends in Gratuitous Assignments To Avoid Federal Income Tax," 64 Yale L.J. 991 (1955).

71 Justices Peckham, McReynolds, Sutherland, Black cited *supra* note 1.

72 See *supra* note 68.

73 That there are many serious problems in untaxed income has been the discovery of the Mills Committee in its 1959 hearing on broadening the tax base. See compendium volumes 1, 2 and 3 for chapter and verse.

patterns. Federal statutes hold each of the assets in a taxable succession subject to an in rem liability for the payment of all of the estate taxes.[74] It is not material to the executor's obligation to make full payment whether the property is in the hands of the fiduciary[75] or whether it has been transferred to beneficiaries[76] including the donee of a gift.[77] Various methods to allocate the burden of the estate taxes do not reduce the right of the government as creditor to require payment out of any of the assets of all three classes no matter by whom the payment is made or where the liability falls.[78]

Income taxes are different. The pervasive sweep of estate tax liability imposed on each item of property at the passing of the taxable estate should be distinguished from the government's right to effect collection of a decedent's ante-mortem income tax liabilities out of the assets devolving to the successors. These are priority debts of the decedent[79] as to which an executor makes at his own peril a transfer of probate property to heirs[80] or creditors.[81] Work-a-day court procedure protects the government's tax claims[82] and the

74 The estate tax is a lien for 10 years upon all the assets of the gross estate of the decedent except such parts as are used for the payment of charges against the estate and for costs of administration. Int. Rev. Code of 1954, § 6324(a)(1).

75 Int. Rev. Code of 1954, § 2002; notice the broad inclusive definition of executor: "any person in actual or constructive possession of any property of the decedent"; Int. Rev. Code of 1954, § 2203; *see also* Int. Rev. Code of 1954, § 7701(a)(6).

76 Int. Rev. Code of 1954, § 6324(a)(2) enumerates non-probate beneficiaries who are liable as transferees. Where several persons are held liable and where one pays more than his proportionate share, he is entitled to contribution from the others. Phillips-Jones Corp. v. Parmley, 302 U.S. 233, 19 Am. Fed. Tax R. 1235, 37-2 U.S.T.C. ¶ 9573 (1937).

77 The donor of a gift is primarily liable; the donee holds the property subject to an in rem lien for the unpaid federal gift tax on the transfer. Int. Rev. Code of 1954, § 6324(b). Query, what is the effect on the contribution rule of the gift tax credit for the tax paid where the gift is included in the estate as having been made in contemplation of death under Int. Rev. Code of 1954, § 2035?

78 Phillips v. Comm'r, 283 U.S. 589, 9 Am. Fed. Tax R. 1467, 2 U.S.T.C. ¶ 743 (1931); Foerster v. Foerster, 71 Ohio L. Abs. 129, 122 N.E.2d 314 (P. Ct. 1954).

79 Comm'r v. Stern, 357 U.S. 39, 1 Am. Fed. Tax R.2d 1899, 58-2 U.S.T.C. ¶ 9594 (1958).

80 Viles v. Comm'r, 233 F.2d 376, 49 Am. Fed. Tax R. 1217, 56-1 U.S.T.C. ¶ 9539 (6th Cir. 1956). Generally, see Alexander, "Personal Liabilities of Executors for Federal Taxes," 9 Tax L. Rev. 1 (1953).

81 48 Stat. 760, 31 U.S.C. § 192 (1958). Notice that this liability turns on priority payment of other debts of the decedent. It is recognized that a distribution to satisfy the Ohio statutory exemption under Ohio Rev. Code § 2115.13 (1953) and the widows allowance under Ohio Rev. Code § 2117.20 (1953) are not debts but quasi pre-existing property claims. Carls Estate, 58 Ohio L. Abs. 3, 39 Am. Fed. Tax R. 908 (P. Ct. 1950). The federal statutes set up federal priority but the Ohio Probate Code seems to effectively modify the absolute federal priority. Ohio Rev. Code § 2117.25 (1953).

82 Franklin County, Ohio Probate Court Rule 5 requires the fiduciary to certify that he knows of no outstanding claims as to which presentation is not required by statute.

Ohio "bob-tail" probate limitation statute requiring presentment of claims within four months[83] cannot shorten the collection period.[84] Neither can state courts lend effective aid and comfort to the executor by a discharge prior to payment of the decedents federal tax liabilities,[85] nor by seizing assets from him to assist other creditors under color of state judicial process.[86]

Collecting unpaid income taxes out of non-probate successions is in a different category if the life insurance cases are instructive. In a non-probate succession by a life insurance beneficiary, the right of the federal government to collect a decedent's unpaid income taxes out of the proceeds turns on whether a tax lien existed before death. The effect of the ante-mortem lien after it has been assessed is determined under federal statute no matter what the state law may be; the life insurance transferee is held liable.[87] This principle certainly encourages the government to be an impatient creditor for the absence of the ante-mortem lien is crucial. Where no assessment has been made, a federal statute[88] has left to state law to determine whether the spirit of the departed can bear the grievous remembrance of the unpaid income tax bills. Congress permits each state to weigh as a matter of policy, whether the burden of the memory of the unpaid federal income taxes on the soul of the debtor is too intolerable to permit it to suffer.[89] Some jurisdictions may still reach the result which in effect follows the ecclesiastical objective to comfort the conscience of the decedent by forcing his successors to satisfy the claims of the public purse[90] out of the life insurance

83 Ohio Rev. Code § 2117.06 (1953).

84 United States v. Summerlin, 310 U.S. 414 (1940).

85 Viles v. Comm'r, *supra* note 80.

86 *Compare* Northwestern Jobbers Credit Bureau, 1 T.C. 863 (1943) *with* G. P. Fitzgerald, 4 T.C. 494 (1944).

87 United States v. Bess, 357 U.S. 51, 1 Am. Fed. Tax R.2d 1904, 58-2 U.S.T.C. ¶ 9595 (1958) applying Int. Rev. Code of 1954, § 6321; see also Barton, "What the Supreme Court Said About Stern and Bess," 37 Taxes 9 (1959); Grayck, "The Liability of a Life Insurance Beneficiary for the Insured Income Taxes: A Postscript to the Supreme Court's Decision in the Stern and Bess Cases," 14 Tax L. Rev. 137 (1958); Heron, "Federal Tax Claims Again or Devastation Revisited," 26 Ins. Counsel J. 112 (1959).

88 The transferee liability statute does not create any new substantive liability but merely provides a new procedure by which the government can collect its taxes. Int. Rev. Code of 1954, § 6901; Comm'r v. Stern, *supra* note 79.

89 This sentence paraphrases the American Episcopalian General Confession which acknowledges "manifold sins and wickedness." At communion, these latter day descendants of the ancient English churchgoers "earnestly repent, and are heartily sorry for these our misdoings; The remembrance of them is grievous unto us; The burden of them is intolerable . . . ." The Book of Common Prayer at 75, Protestant Episcopal Church in America, New York, 1945.

90 Walfer & Cahn, "The United States as a Creditor for Taxes," 35 Taxes 604

proceeds. Ohio careth not[91] for the post-mortem repose of the consciences of her citizenry: it has declared that life insurance proceeds are not subject to seizure[92] and the federal courts will not enforce payment of government claims for unpaid income taxes against insurance proceeds[93] except where it is paid to an estate.[94] This local law doctrine may apply to most non-probate assets; it will vary from state to state and from one type of asset to another. This variable state-to-state approach as to income tax liabilities should be contrasted with the rigorous rule which inexorably requires payment of all estate taxes out of any assets, probate or non-probate, including insurance proceeds.[95]

After the executor has satisfied the money demands of the government, the question arises as to who effectively pays the estate tax bill through the reduction of their respective shares resulting from the distribution settlement? Proportionate allocation among various beneficiaries would seem to be a sound method; indeed this is close to the theory of the Ohio inheritance tax which reduces the share of each beneficiary by the amount of taxes assessed against each respective succession.[96] Since the federal estate tax falls on property passing according to state law by all three methods of devolution, it seems fair that each beneficiary should pay an allocated proportion. This

(1957); and for a definitive exposition generally, see Plumb, "Federal Tax, Collection and Lien Problems," 13 Tax L. Rev. 247 (1958) and Walson, "Federal Tax Liens—A Study in Confusion and Confiscation," 43 Marq. L. Rev. 180 (1959). See also Reiling, "Priority of Federal Tax Liens," 36 Taxes 978 (1958).

91 The frequent references here to the ancient church and the effect its teachings have had upon the modern law of devolution suggest the use of archaic language commonly employed in its observances. Veblen has particularly discoursed on the general subject, The Theory of the Leisure Class, chapter 12 *passim*, "Devout Observances" (1899).

92 Ohio Rev. Code § 3911.10 (1955) as to life insurance proceeds payable to the widow, children and named creditors. The right to change the beneficiary makes no difference. Baxter v. Old National-City Bank, 46 Ohio App. 533, 189 N.E. 514 (1933). As to a similar exemption from attachment of proceeds of group life insurance, see Ohio Rev. Code § 3917.05 (1953). See Note, 20 Ohio St. L.J. 361 (1959).

93 *Compare Bess & Stern, with* Bowlin v. Comm'r, 273 F.2d 610, 5 Am. Fed. Tax R.2d 389, 60-1 U.S.T.C. ¶ 9172 (6th Cir. 1960) (conveyance of property including insurance otherwise exempt was found to be fraudulent under Tennessee law, therefore proceeds held liable for federal income taxes).

94 The exemption statute expressly applies only to proceeds payable to certain categories of beneficiaries of which the estate is not one. See also Kieferdorf v. Comm'r, 142 F.2d 723, 32 Am. Fed. Tax R. 728, 44-1 U.S.T.C. ¶ 9323 (9th Cir. 1944), which appears to be applicable even though *Stern & Bess* have intervened.

95 See text at *supra* notes 74-78.

96 "A tax is hereby levied upon the succession to any property passing, in trust or otherwise, to or for use of a person, institution or corporation . . . ." Ohio Rev. Code § 5731.02 (1953).

logical result is too simple and the legal history is too confused to reach such a neat solution.

As a basic premise, the Supreme Court has told us that Congress intended that the ordinary estate tax liability falls on successors according to the state law of administration and succession.[97] Whatever the applicable state law may be, the Tax Court need not decide state law as to the allocation of the burden of the federal estate tax in deficiency proceedings.[98] Of course, just like most other testate successions,[99] the testator can control the incidence of the federal tax burden by explicit provisions in the terms of his will.[100] In the absence of testate direction, the allocation answers turn in part on the distinction between probate property and non-probate succession:

1. By federal statute, where an excessive amount of the estate tax liability has been paid by a non-probate beneficiary or collected out of non-probate property, the beneficiary is entitled to recover from the estate the amount by which his payments exceed an equitable proportion.[101] By a cognate federal statute, the same result is reached as to life insurance proceeds[102]

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97 Riggs v. DelDrago, 317 U.S. 95, 29 Am. Fed. Tax R. 1205, 40-2 U.S.T.C. ¶ 10,219 (1942).

98 Tarver's Estate v. Comm'r, 255 F.2d 913, 1 Am. Fed. Tax R.2d 2174, 58-2 U.S.T.C. ¶ 11,805 (4th Cir. 1958).

99 American law permits the broadest sweep to the freedom of testacy known in the western world. See generally Atkinson, "Succession Among Collaterals," 20 Iowa L. Rev. 185 (1935); Kennedy, "Testator's Dependents Relief Legislation," 20 Iowa L. Rev. 317 (1935); Lanfer, "Flexible Restraints on Testamentary Freedom—a Report on Decedents Family Maintenance Legislation," 69 Harv. L. Rev. 277 (1955); Touster, "Testamentary Freedom and Social Control—After Born Children," 6 Buffalo L. Rev. 251 (1957). See also Cahn, "Federal Regulation of Inheritance," 88 U. Pa. L. Rev. 297 (1940); Cavers, "Change in the American Family and the Laughing Heir," 20 Iowa L. Rev. 202 (1935); Headley, "Inheritance—a Basic Personal Freedom," 88 Trusts & Estates 24 (1949); Magill, "Federal Regulation of Family Settlements," 4 U. Chi. L. Rev. 265 (1937); Simes, "Protecting the Surviving Spouse by Restraints on the Dead Hand," 26 U. Cinc. L. Rev. 1 (1957); Sayre, "Recent Ideologies in the Law of Succession to Property," 32 Ill. L. Rev. 690, 699 (1938). Is there a policy implication in the kind of situation which resulted in the decision of the Supreme Court in *In re* Estate of Kelly, 165 Ohio St. 259, 135 N.E.2d 378 (1956)? Virtually the only widespread effective limitations on testacy are the provisions which insure—out of probate property only—a fractional share for the surviving spouse. Compare Ohio Rev. Code § 2103.02 (1953). Recently, English statutes have imposed limitations on the right to pass property to those outside the family circle where they do not come within family obligations.

100 Int. Rev. Code of 1954, §§ 2205, 2206, 2207; United States v. Goodson, 253 F.2d 900, 1 Am. Fed. Tax R.2d 2133 (8th Cir. 1958); *In re* Estate of Gatch, 153 Ohio St. 401, 92 N.E.2d 404 (1950); YMCA v. Davis, 106 Ohio St. 366, 140 N.E.2d 114 (1922), *aff'd*, 264 U.S. 47 (1924).

101 Int. Rev. Code of 1954, § 2205.

102 Int. Rev. Code of 1954, § 2206.

by a reverse method of statement; and the recipient of property over which the decedent had a power of appointment by statute is similarly liable to the executor of the estate to make an equitable contribution out of his succession.[103]

2. Supplementing the federal law, Ohio requires equitable contribution between the beneficiaries of non-probate property and the probate estate considered as a unit. Thus a beneficiary under an inter vivos revocable trust not subject to probate administration has been held to a duty to contribute proportionately[104] to the payment of federal estate taxes.[105] Required contribution[106] would seem to apply proportionately between the probate estate as an entity and all species of non-probate assets[107] within the major categories of devolution following a method of allocated proportionate contribution.[108] This rule is so strong that Ohio has recognized that the general testamentary direction to pay debts and taxes of the decedent found in many wills is not sufficiently indicative of testative intention to pay from the probate estate the death taxes generated by non-probate property.[109]

3. Within the probate estate, the allocation is quite different. Ancient probate doctrines re-emerge in the absence of explicit

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103 Int. Rev. Code of 1954, § 2207.

104 MacDougall v. Central Nat'l Bank of Cleveland, 157 Ohio St. 45, 104 N.E.2d 441 (1952); see also *In re* Estate of Gatch, *supra* note 100 as to life insurance; see Annot., 37 A.L.R.2d 169 (1954).

105 Foerster v. Foerster, 71 Ohio L. Abs. 129, 122 N.E.2d 314 (P. Ct. 1954) exonerated non-probate assets from contribution where a concomitant marital deduction produced no estate tax liability.

106 Generally on this pervasive and immediate problem, see Lauritzen, "Apportionment of Federal Estate Tax," 1 Tax Counsellor's Quarterly 55 (1957); Note, Wash. Univ. L. Q. 89 (1955); Sutter, "How to Plan for Apportionment of Estate Taxes," 2 Estate Tax Techniques 2137 (1955); and Stickney, "Who Pays the Federal Estate Tax?," 18 U. Cinc. L. Rev. 1 (1949). See also Brofman, "The Burden of Federal Estate Taxes," 29 Rocky Mt. L. Rev. 498 (1957).

107 Central Trust Co. v. Lamb, 74 Ohio App. 299, 58 N.E.2d 785 (1944); *In re* Estate of Jennings, 28 Ohio Op. 66, 40 Ohio L. Abs. 313 (P. Ct. 1944). See Annot., 15 A.L.R.2d 1216 (1951).

108 Query in what court by what procedure can contribution be enforced against the inter vivos trust? New York statute has recently conferred authority on the surrogates court. See *In re* Estate of Colosimo, 104 Ohio App. 342, 149 N.E.2d 31 (Ct. App. 1957). As to one application of the rule requiring proportionate contribution, see Phillips Jones Corp. v. Parmley, *supra* note 76 which enforced equitable contribution between transferees.

109 *In re* Estate of Gatch, *supra* note 100.

testamentary direction: following ordinary probate distribution priorities,[110] personal property is first called on to settle all debts, federal government tax claims as well, even to the extent of requiring no contribution from real estate.[111] After determining the respective interests of probate beneficiaries in the types of property they receive net after payment of taxes, the fraction each beneficiary gets is charged with the taxes allocable to each respective share if it be determined according to the statute of descent and distribution. Thus when the widow's share is fixed by intestacy[112] or by election,[113] or where a succession passes to charity,[114] neither gets the direct benefit of the entire marital and charitable deductions. The shares of all beneficiaries benefit from the deduction without recourse to the tax computation; the distribution is determined by reference to whether he gets personalty by specific legacy in the will, or whether it descends under the general residue clause, or whether it passes by intestacy under the statute of descent.

The notions underlying contribution are strong and persuasive; their origins lie in ancient doctrines of equity. The strong aversion to hold real estate for the payment of debts of a decedent follows an even longer current of legal history, the reasons for which have disappeared. Even so, the established preference for general real estate over personalty has a slightly functional basis quite apart from its roots in the feudal system: personalty is usually easier to liquidate. Is this enough to continue to justify the preference of one class of successors against another?

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110 Generally, see Annot., 74 A.L.R.2d 553 (1960) and Ohio Rev. Code § 2107.53 (1953).

111 Compare Ginder v. Ginder, 72 Ohio L. Abs. 277 (P. Ct. 1954). For an unreported case in accord with the *Ginder* rule, see *In re* Estate of Ada M. Clay, Ohio Ct. App. (Seneca County) No. 355 (1959), 4 Danaher, "Developments In Ohio Probate and Inheritance Tax Law" 44 (1960).

112 Campbell v. Lloyd, 162 Ohio St. 203, 122 N.E.2d 695, *cert. denied*, 349 U.S. 911 (1954) overruling Miller v. Hammond, 156 Ohio St. 475, 104 N.E.2d 9 (1952) held that the widows share is proportionately reduced by the proportionate share of the estate taxes even though a part of the benefit of her marital deduction reduced the total estate tax liability. The decision was followed in Estate of Rose G. Jaeger, 27 T.C. 863 (1957), *aff'd per curiam*, 252 F.2d 790, 1 Am. Fed. Tax R.2d 2115, 58-1 U.S.T.C. ¶ 11,750 (6th Cir. 1958).

113 Consider as an example MacDougall v. Central Nat'l Bank of Cleveland, 157 Ohio St. 45, 104 N.E.2d 441 (1952).

114 Similarly to the *Campbell* case, *supra* note 112, applied to a charitable deduction, see Hall v. Ball, 162 Ohio St. 299, 123 N.E.2d 259 (1954).

TABLE 2
RESPONSIBILITIES OF SUCCESSORS TO PROPERTY VALUES FOR FEDERAL INCOME AND ESTATE TAX LIABILITIES FOLLOWING THE DEATH OF AN OWNER

Major Property Categories	Major devolution categories generating tax responsibilities	Decedent's last income tax return for lifetime receipts or accruals	Federal estate tax includibility at date of death	Tax duties of probate fiduciary or successor owner	Property & tax methods for transfer and income taxation	Successors income tax responsibility after transfer from the decedent
Parenthetical Fundamental	Interrelationship of income and estate taxes underlie all taxable values	Unpaid income taxes returnable before death reduce gross estate, effectively cut estate tax	Untaxed income fully includible without adjustment for potential income tax	Includibility of income item in estate tax base produces a corresponding income tax deduction available to distributee of the taxable income right for allocation to each recipient according to proportionate relationship of each income item to total includible gross estate.		
Probate Property	Probate assets	Accountable for all income taxable to date of death	Includible in both probate estate and tax base	Fiduciary liable for tax on income received if not distributed	DNI* method or estate distributions in kind carry income to successors	Successors liable for taxes after administrative transfer from estate
Probate Property	Deductions attributable to probate assets	Deductions allowable if paid before date of death	Deductibles not paid reduce estate tax as debts of decedent	Fiduciary gets benefit if paid during administration	Amount of DNI* or distributions are reduced	Successors get deduction or benefit by reduction of DNI*
Real Estate	Ownership of productive real estate	All rentals are taxable to date of death	Fair market value includible	Title to real property ordinarily passes to heirs at death by ancient common law doctrine subject only to recapture under Ohio Rev. Code § 2127.02 (1953) if needed to pay debts.		
Real Estate	Deductions attributable to ownership of realty	Deductions allowable if paid before date of death	Deductibles not paid reduce estate tax as debts of decedent	Income tax liabilities fall directly on the heirs. All unused deductions follow to the heirs independently of estate administration proccesses.		

TABLE 2 (*continued*)

NON PROBATE ASSETS	Non-probate assets	Income taxable until death to various special parties	Estate tax is proportionately assessed against recipient	Beneficiary succeeds directly to income rights at death	Income passes with contract with income tax implied	Beneficiary succeeds directly to income, pays taxes
	Deductions attributable to non-probate assets	Deductions follow the non-probate property	Estate tax relief results from deduction for non-probate debt	Deduction benefit passes only to non probate beneficiary	Passes as incident to contract rights	Deduction benefit is insulated for non-probate beneficiary alone
DECEDENT'S LIFETIME PERSONAL DEDUCTIONS	Decedent's personal deductions during lifetime	Deductible only if properly paid or accrued during lifetime	As unpaid debts, are deductible only against corpus of probate estate	Most not deductible against fiduciary return during administration	Payment reduces net probate assets, but no tax effect on successors	Most not deductible against successor's return after administration
	Decedent's medical expense	Deductible if paid or accrued during lifetime or paid within year after death	As unpaid debts, are alternatively deductible against probate corpus	Not deductible against fiduciary return	Reduces net probate assets, hence no effect on successors	Surviving spouse only may alternatively deduct in year of payment
TAXES AND COSTS OF SUCCESSION	Costs of administration of decedent's estate	Do not arise until after death, hence not applicable to final tax return	Alternative deduction for estate tax	Alternative deduction for fiduciary income tax	Reduces net probate assets; or to reduce DNI*; or by termination deduction	Deductible to successors if properly timed and terminated
	Allocation of death taxes can be changed by decedent's intention	Ohio equitable contribution doctrine assesses federal estate tax liabilities proportionately against probate and non-probate property; but executor may be liable but is given federal and Ohio authority to collect all tax due from any person who receives assets			Contribution doctrine does not apply as between residuary probate personalty and real estate; personalty is first exhausted	

* Distributable net income concept under Internal Revenue Code of 1954, § 643(a).

CONCLUSION

"A page of history is worth a volume of logic."[115] The mailed fists of the English military authorities of the Norman feudal period still reach into the daily practice of American lawyers. The spiritual notions of medieval churchmen still hover near the consciences of contemporary decedents. Over these have appeared newer varieties of succession techniques which have jumped across these pages of history and intruded upon volumes of modern logic based on ancient third party beneficiary doctrine in the law of contracts. Superimposed on these have grown the implications and complications of the American federal system of divided governmental authority and mixed sources for rules of decision.[116] The present law of federal tax impositions and collections out of successions is drawn from many other pages of history and numerous volumes of logic. History testifies as a witness and shouts as an advocate that indeed, tax law is not a separate watertight compartment.

Modern probate law has grown into increasing complexity while the push of economic inflation has brought an increasing number of estates and incomes into the reach of the federal tax gatherers. The probate practitioner cannot dismiss this history by disclaiming his competence in the tax law. Thus one obvious practical fact to prove this point is the necessity that the burden of the tax debt must be reckoned with algebraically[117] in order to competently perform the

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[115] Mr. Justice Holmes in New York Trust Co. v. Eisner, 256 U.S. 345, 349, 3 Am. Fed. Tax R. 3110, 1 U.S.T.C. ¶ 49 (1921).

[116] The federal taxing statute is plenary and controlling in its own sphere as an incident of the taxing power of the federal government; Burnet v. Harmel, 287 U.S. 103, 11 Am. Fed. Tax R. 1085, 3 U.S.T.C. ¶ 990 (1932). Federal tax law has partially imported state law to suit its own purposes. See Lyeth v. Hoey, 305 U.S. 188, 21 Am. Fed. Tax R. 986, 38-2 U.S.T.C. ¶ 9602 (1938) and Stern v. Comm'r, *supra* note 79; "The Role of State Law in Federal Tax Determinations," 72 Harv. L. Rev. 1350 (1959). But in all these areas, federal law remains supreme; it has only borrowed the state law. The federal standard can easily abandon the state law results any time it decides to do so. Compare the history of estate taxation which started with Poe v. Seaborn, 282 U.S. 101, 9 Am. Fed. Tax R. 576, 2 U.S.T.C. ¶ 611 (1930) and culminated in the changes in Internal Revenue Code of 1954, § 2056.

Contrast the applicability of state law in diversity litigation in the federal courts. Justice Brandeis pointed out that state law was the only possible source to determine the rules of substantive decision; Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Thus stated the only job of the federal court in a diversity case is to discover and apply state law even if it has to be deduced from precedents which originated in lower echelon state courts. West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); in the federal field, compare Helvering v. Stuart, 317 U.S. 154, 29 Am. Fed. Tax R. 1209, 42-2 U.S.T.C. ¶ 9750 (1942) and Gallagher v. Smith, 223 F.2d 218, 47 Am. Fed. Tax R. 1230, 55-1 U.S.T.C. ¶ 9485 (3d Cir. 1955).

[117] In the absence of overqualification for the marital deduction or a formula clause,

distributive function. Taxation is an eminently practical part of the general fabric of the law. Not to understand this fundamental, displays technical incompetence and betrays professional responsibility.

the amount of federal estate tax depends upon the amount of property which actually passes to the widow under Internal Revenue Code of 1954, § 2056(a); Treas. Reg. § 20.2056(b)-4(c) (1958). Since the amount passing to the widow depends upon the amount of the marital deduction which in turn affects the determination of the estate tax, the result is two mutually interdependent unknowns. Their solution can get still more complicated in the presence of similar interdependents based on a state death tax credit and a variable charitable credit. They can be solved by simultaneous algebraic equations, or by a series of estimates. These methods appear at Powers, "How to Solve Mathematical Problems of Husband-Wife Estate Planning," 1 Estate Tax Techniques 3. The Internal Revenue Service has devised some useful variations. See Supplemental Instructions for Computation of Interrelated Death Taxes and Marital Deduction for Form 706, Publication No. 210, Government Printing Office (1955).